

9 Official Opinions of the Compliance Board 226 (2015)

- ◆ **6(B)(1) MINUTES – ACT DOES NOT GOVERN PUBLIC BODY’S DECISION
TO ASK COUNSEL TO REVIEW DRAFT MINUTES**
- ◆ **6(1)(2) CLOSED SESSION – SUMMARY MAY BE INCLUDED IN EITHER
THE MINUTES OF THAT DAY’S OPEN SESSION OR THE MINUTES
OF THE NEXT OPEN SESSION**
- ◆ **7 COMPLIANCE BOARD – NO AUTHORITY TO ADDRESS THE WAY
IN WHICH PUBLIC BODIES POST MINUTES ONLINE**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at
http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf**

March 23, 2015

Re: Maryland Health Benefit Exchange
Craig O'Donnell, Complainant

In his seventh complaint about the open meetings practices of the Maryland Health Benefit Exchange Board (“MHBE Board”), Complainant Craig O’Donnell alleges that the MHBE Board violated the Act with respect to its disclosure of the summary of a closed meeting that it held on November 12, 2014.

As explained below, we find that the MHBE Board did not violate the Act. In this opinion, we will again direct this Complainant to the allegations that do *not* state violations of the Act. We will also give the MHBE Board, which now provides online access to commendably detailed information about its closed sessions, some suggestions on how to avoid complaints like this.

The Act requires public bodies to include information about their closed meetings in the minutes of the next open meeting. § 3-306 (c)(2).¹ For a public body that meets monthly and adopts minutes at each successive

¹ Statutory references are to the General Provisions Article of the Maryland Code.

meeting, that means that the disclosure will be available to the public two months after the closed meeting. Many public bodies, the MHBE among them, shorten that period by instead including the summary in the minutes of the meeting that was closed. That way, the public only has to wait for one month, and we have therefore approved of the practice so long as the public knows where to look. *See, e.g. 3 OMCB Opinions* 264, 270 (2003). Either way, nothing in the Act requires a public body to post its minutes online. With those principles in mind, we look at the facts here.

The MHBE Board held a closed session during its November 12, 2014 meeting. The MHBE Board next met on December 16, 2014 and, at that meeting, approved the minutes of the November 12 meeting. The Act did not require the MHBE Board to include the closed-session summary in the November minutes, but the MHBE Board would have been allowed to do so. The reason it did not, its counsel explains, is that the summary was left out of the members' minutes packet by mistake. The MHBE Board next met on January 20, 2015. That day, the members approved the minutes for the December 16 meeting. Those minutes also did not contain the summary. However, also during the January 20 meeting, the MHBE amended the November 12 minutes to include the summary. To summarize: on January 20, the MHBE Board adopted the summary required by the Act, but the MHBE Board did so by way of amending the November 12 minutes, where it has usually put that information, rather than including it in the December 16 minutes.

Complainant submitted this complaint to us on December 23. He complained that the MHBE usually posts its closed summary with the minutes of the meeting that was closed but had not done so for this meeting. As explained above, the MHBE Board was not required to approve the summary when it approved the November 12 minutes, and so it did not violate the Act when the summary was originally omitted from those minutes.

As for the later events described by MHBE's counsel, we suggest only some preventative measures. A notation on the link to the November 12 minutes to show that the MHBE Board had amended them on January 20 would signal that fact to people who had read them earlier. As for conveying the message that the closed-session summary was now available, the "Statement for Closing a Meeting" could be described more exactly as the "Statement for Closing a Meeting with Post-Session Summary." However, online labeling glitches do not violate the Act. As this Complainant knows very well, because this Board has told him often, nothing in the Act requires a public body to post minutes online.

In the interest of providing Complainant direction on the allegations he need not present to us again, we will identify several matters in the complaint that do *not* state a violation of the Act. First, Complainant complained, as he

did in his fourth complaint about the MHBE Board, that the MHBE posts its closing summary as a separate document from the minutes. *See 9 OMCB Opinions* 160, 162 (2014). We will give the same answer: a public body that posts its minutes online may incorporate by reference a linked closed-session summary, just as a public body that makes its minutes available for inspection at its place of business may provide minutes that refer the reader to an attached exhibit that contains the summary.²

Second, Complainant complained, also as he has before, that MHBE posts its closed-session summary on a typed version of the written statement that the MHBE Board makes before closing a meeting. We do not understand Complainant's continuing problem with this type of presentation, which (a) makes a hand-written disclosure more legible for the reader and (b) allows a member of the public to easily compare, on one document, what the public body said that it would discuss in the closed session with what it actually did discuss. As we have often said, the written disclosures made before a closed session, when combined with those made afterwards, are an important accountability tool. It hardly does the public a disservice to provide both sets of information online, in one place, in a legible format. We do not share Complainant's inference that there is something wrong with posting typed versions of hand-written documents.

Third, Complainant protests, as he has before, the practice followed by many public bodies of asking their counsel to review minutes and closed-

² The amended November 12 minutes, in reporting on the vote to close the November 12 session, state: "For topics discussed and actions taken, please see the Statement for Closing a Meeting dated November 12, 2014." The minutes then provide the URL at which that document can be found. If a person finds that the URL does not lead to the information, a person can look right under the link labeled "minutes" and click on the link labelled "Closed Meeting Statement 11.12.14." What Complainant found "frustrating" on December 23 was that the posted closing statement contained only the disclosures made before the closed session. Although MHBE staff had told Complainant on the morning of the 23rd that counsel was away for the holidays and that the summary would not be available until after she got back, he submitted this complaint to us that day. Then, on Sunday, December 28, after the passage of only one business day after he had filed the complaint, he submitted to us, the Secretary of the Department of Health and Mental Hygiene, and that department's Principal Counsel, a complaint that the closed-session summary was still not available.

Against this backdrop, we note that the November 12 minutes, as adopted, had already provided the interested public with extensive detail about the closed session. The written statement that was prepared before the meeting was summarized in the minutes. The minutes show that the Chair identified with precision six sets of contract matters on which the MHBE intended to seek legal advice. The minutes also show that an open "Voting Session" occurred right after the closed session, and they detail the open-session discussions and votes on each matter.

session summaries before approving them. We do not find that practice sinister: asking counsel to review a closed-session summary is prudent for a public body that has closed a meeting to preserve the attorney-client privilege (as here) or the confidentiality of other legally-protected information.

We add our concern that complaints such as these may discourage public bodies from posting their meeting documents online. Here, for example, the complaint contains lengthy allegations about the difficulty Complainant had in accessing a document for which, he alleges, the link was broken when he tried it. In such instances, a polite message to technology staff might be appropriate and useful. A complaint to us is not, and such complaints provide public bodies too easy an excuse to avoid disseminating their information online.

In conclusion: Although this Complainant's initial complaints about this public body's meeting practices raised some substantial Open Meetings Act questions, this one did not. We have found no violations of the Act.

Open Meetings Compliance Board

Monica J. Johnson, Esq.
Wanda Martinez, Esq.